

## Chapter 7

# A Meditation on *Mahr*, Modernity, and Muslim Marriage Contract Law

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### Introduction

“Be a bit strategic,” I advise the young bride. “Think about whether you might someday want to be a stay-at-home mom—you could set your *mahr* (dower) so that you won’t have to be completely financially dependent on your husband at that time.”

“But that still feels like I’m putting a price on myself,” she answers. “It just makes me uncomfortable. I would rather just make my *mahr* something symbolic and leave it at that.”

I have had a version of this conversation with many different people as I have engaged the topic of Islamic family law as both an academic and activist over the years. It has always frustrated me when women, like the bride here, casually dismiss the *mahr* in apparent disregard for its women-empowering potential. Quranically-required of every valid Muslim marriage contract, the *mahr* provision designates some property to be given (or promised) to a bride upon marriage, and Islamic property law protects it as exclusively hers, not to be used by anyone (including the men) in her life. For these reasons, a substantial *mahr* can provide a woman with financial independence during marriage or give her the ability to leave a bad one. I have long felt that women who casually dismiss the *mahr* could be dangerously limiting their future life choices, just because it doesn’t *feel* right.

On the other hand, these women do have a point. For a bride, but not a groom, to be paid some financial sum as part of a marriage contract does seem, at some level, like the woman is selling herself. This is certainly better than *being* sold, but not by much. As many have noted, classical Islamic jurisprudence often used the term “price” to describe the *mahr*, and Islamic marriage contract law was specifically based on the model of a contract of sale. Even more disturbing, in order to work out the doctrinal details of Islamic marriage law, early Muslim jurists often analogized marriage contracts to slavery, and especially to contracts for the purchase of a female slave. The gendered background presumptions that accompany this analogy permeate nearly every aspect of Islamic legal doctrine on marriage, affecting not only the *mahr* at the beginning, but also the rights and

responsibilities of the parties during a marriage, and their respective access to divorce at the end.

The intertwining of slave sale contracts in the jurisprudence of Islamic marriage law is why Kecia Ali has argued that the strategy used by Muslim women activists to find feminist uses for classically-established Islamic legal doctrines like the *mahr* is fundamentally flawed. It “misses the forest for the trees,” she argues, because it “focus[es] on isolated rights without paying attention to how they are embedded in a system of interdependent spousal obligations” (Ali 2003: 164)—a system flawed by historical norms about slavery and sexual autonomy that no longer hold true today. She therefore urges a wholesale rethinking of the whole paradigm of Islamic marriage law to better fit modern sensibilities and practice.

I agree with Kecia Ali—up to a point. I believe that the sales contract was indeed an unfortunate choice for framing Islamic marriage contract law, and that its inherent problems were further exacerbated by the development of Islamic law in a historical context where slavery (especially concubinage) was socially acceptable. But I do not have quite as much criticism as she does for the Muslim women’s rights activism that works within the existing doctrine, and I will explain why below. Nevertheless, I agree with Ali that the slavery framework and its resulting doctrine are not dictated by scripture, so we are not obligated to perpetuate them today—especially when their historical contexts have so little in common with how we now think about marriage, women, and sexuality. Thus, it is not only theoretically possible but also appropriate to ask what sort of alternative model could be used to create a different scheme of Islamic family law for today. In this chapter, I will briefly describe what I think could be a better doctrinal model for Islamic marriage law, and point the way toward how it could be developed further by more qualified Muslim jurist-scholars. Despite her urging for a new paradigm, Kecia Ali does not offer any of her own ideas about what that might look like, so it is difficult to know if she and I would agree upon the same solutions.

In a nutshell, I think a workable alternative would be to use partnership, rather than sales, as the framework for Islamic marriage contract law. I believe that applying the well-established (and recently re-energized) principles of Islamic partnership law to Muslim marriage contracts would have several advantages over the current sales-based framework, including eliminating several traditional rules that have been harmful to women. Among other things, some of the existing rules that would disappear under a partnership model include: the lack of mutuality between husband and wife, legal tolerance of marital rape, and a husband’s exclusive right to unilateral divorce. A scheme of Islamic marriage law based on partnership contracts would also fit better with modern attitudes about marriage, mutuality, women, and individual agency. As such, it would support the *sharia*-based approach of Muslim women’s rights activists more effectively than the current strategies that sometimes require uncomfortably stretching and pulling outdated doctrines to fit modern sensibilities.

But my enthusiasm for a paradigm shift to this alternative model for Islamic marriage law is tempered by this caveat: paradigm shifts are not easy. They usually

require disentangling emotional connections and long-held patterns of behavior, and these changes usually require much more than a good theoretical argument. So, while as a legal theorist, I would wholeheartedly support new Islamic marriage law based on a partnership contract model, the activist in me is concerned about the pragmatic realities of making it stick. Simply put, no matter how perfectly developed it might be, not everyone will be convinced to switch to this new scheme of marriage law. I therefore end this chapter with a brief discussion of what I think are the real-life challenges to introducing such an alternative model, and what I think should be done in light of these realities.

### ***Sharia*-based Muslim Women's Rights Activism: Pros and Cons**

I have recently written about the work of Muslim women's rights activists who operate from a *sharia*-mindful perspective, commenting on why I believe this approach is often more effective than that of secular feminists working for Muslim women's rights (Quraishi 2011). One advantage of the *sharia*-mindful approach is that much of its starting point is uncontested by even the most conservative and traditional of Muslims. Rather than dismissing all Islamic law as patriarchally-biased, these scholars and activists take the more complicated route of finding those parts of established Islamic legal doctrine that can be harnessed and proliferated to pursue and protect women's rights. Because they come from uncontroversial and established rules that already have persuasive weight with the vast majority of practicing Muslims, this approach can provide Muslim women with immediately effective tools for empowerment. This has a much more direct impact in individual women's lives than the much longer (and often unsuccessful) projects aimed at reforming Islamic legal doctrine that is harmful to women.

As it turns out, these activists have identified quite a few rules within established Islamic law that can be used to empower women. For example, recognizing and protecting a woman's right to own (and inherit) property in her own name has been a distinguishing feature of Islamic law among the world's legal systems for centuries. All the classical schools of Islamic law agree that a woman's property is exclusively her own—no one can assert any legal claim over it, including her male relatives. (Those familiar with women's rights under common law will recognize that this Islamic rule is quite a bit more feminist than the property rules that applied to English and American women until not too long ago.) Further, Islamic law also sets aside the *mahr* as a specific allocation of property available to every married Muslim woman. Because it is Quranically-mandated, Muslims often speak of the *mahr* in sacrosanct tones, making it a powerful tool for a Muslim woman to achieve financial security and independence—often the most difficult sort of independence for women to acquire. Whether saved or invested at the beginning of a marriage, or deferred to be paid in the event of divorce or widowhood, a well-calculated *mahr* could give an otherwise financially-dependent wife the ability to initiate divorce or survive life on her own. (And accessing one's *mahr* is often a

quicker and more reliable way to set up one's financial life than waiting for court-ordered alimony and/or the division of marital property assets.) Moreover, a large *mahr* deferred to the time of divorce could also be used to deter a husband from exercising his established Islamic legal right to unilateral divorce (*talaq*) against his wife's will.

There are also other ways for women to protect themselves against the impact of traditional Islamic marriage rules that favor men. One emphasized by many *sharia*-based Muslim women's rights activists is the marriage contract itself. Under established Islamic legal doctrine, a Muslim marriage contract can include stipulations that alter the otherwise default rules of Islamic marriage law (rules that often disadvantage women). For example, a contract could include a stipulation limiting the husband's ability to take another wife or it could give the wife equal access to divorce. It might even specify that the wife is not expected to do household cooking and cleaning, reflecting the established rule that a wife has no Islamic obligation to do housework (Quraishi and Syeed-Miller 2004). Muslim women's rights activists today regularly point to this old Islamic legal principle to counter the arguments of those who insist on a gendered division of household labor. They also point to the wisdom and foresight of classical Islamic law in holding that, if a wife does perform such work, it may be financially compensable. This rule could be crucial in the distribution of assets upon the divorce of a stay-at-home wife and breadwinning husband—especially where community property is not an option.

All of these examples take the approach of using existing Islamic doctrine, rather than emphasizing its reform, to improve the lives of Muslim women. I have seen the effectiveness of this approach in my work with and observations of Muslim grassroots organizations over the years. The use of established Islamic legal doctrine was instrumental, for example, in the legal advocacy strategies chosen by lawyers defending women against adultery charges in Nigeria and the way in which Pakistan's adultery laws were ultimately amended in 2006 (Quraishi 2011). The effectiveness of this approach explains why many Muslims emphasize Prophetic practice (rather than secular law) to condemn domestic violence in their communities and why average Muslim women and girls assert their right to an education by appealing to Quranic verses rather than to international declarations of the rights of the child. Simply put, Islamically-based arguments for women's rights give a religious edge to rights claims that secular and reform arguments cannot. Thus, it is not surprising that Muslim women's activists appropriate traditional Islamic legal concepts like the *mahr* to help empower Muslim women. This strategy appeals to, rather than challenges, the religious sentiments of even the most conservative Muslims and legal scholars and thus faces less opposition than feminist legal reform efforts. This is why promoting Islamic legal education for Muslim women has become a high priority for many *sharia*-based Muslim women's rights organizations. Fluency in established Islamic legal doctrine, it is believed, is crucial to giving Muslim women the necessary tools to fight for their rights (Quraishi 2011).

On the other hand, this strategy comes with a weakness. As Kecia Ali has argued, selectively emphasizing and giving feminist rationales to some parts of classical Islamic law fails to really engage with the jurisprudence as a coherent whole (Ali 2003). In other words, it may be dangerous to emphasize only the woman-empowering aspects of established Islamic law without adequately warning that many of these rules come with not-so-empowering side effects and caveats. By not telling the whole story, this approach runs the risk of leaving Muslim women vulnerable to unexpected consequences when the rest of the law comes into play. For example, many of the stipulations that a Muslim woman might include in her marriage contract are enforceable only in the Hanbali school of law. And even when a stipulation is recognized as valid, many schools offer very limited relief for its breach—and very rarely is it specific performance. Thus, in most schools of Islamic law, a marriage contract stipulation that a husband will remain monogamous does not entitle a wife to end her husband's marriage to a co-wife, but rather, it only gives her grounds for divorce in the event that this happens. Having the freedom to choose between divorce and polygamy is, of course, not a meaningful choice for most women, and is especially shocking to those who believe they have protected themselves against such a predicament in their marriage contract.

Even the *mahr* is not as sacred as one might expect from its Quranic origin. According to established Islamic jurisprudence, whether or not a wife may keep her *mahr* upon divorce depends upon the type of divorce. A wife's *mahr* is safely hers if her husband exercises his right to a unilateral divorce (*talaq*). But a wife-initiated divorce quite often results in a forfeiture of *mahr*. Established Islamic law provides two ways for a wife to initiate and secure a divorce: 1) extra-judicially, with the consent of her husband ("*khul'*") or 2) by proving sufficient grounds before a judge (*faskh*). It is generally assumed that in a *khul'* divorce, a wife returns her *mahr*. (Some men take advantage of this situation. A husband who would like to initiate a *talaq* but does not want to pay the *mahr* might make life so unbearable for his wife that she requests a *khul'* divorce, which he then agrees to when she forfeits her *mahr*.) The last type of divorce, *faskh*, could protect a wife's *mahr*, but this requires her to prove adequate grounds (i.e. fault of the husband), the sufficiency of which are to be decided by a judge, and some schools of Islamic law make this virtually impossible.

The practical implication of all this is that, while the current *sharia*-based strategies may be successfully encouraging Muslim women to take advantage of some established doctrine for feminist reasons, sometimes these women face surprising disappointment when they attempt to enforce their understandings of their rights. The strategy is vulnerable because the jurisprudential theory that created the rules in the first place does not match the feminist rationales promoted by those focusing on the woman-empowering provisions. This is why Kecia Ali argues that more is needed than selective appropriation of some apparently favorable aspects of established Islamic law. Part of the problem, she argues, is that the methodological background to most established Islamic marriage law is

so out of step with contemporary sensibilities that it is downplayed or ignored not only by modern Muslim feminist activists, but also by popular Muslim discourse generally (Ali 2003: 166). To take her argument further, unless these background presumptions and theories are brought into the light of contemporary discourse, they may prove to be the Achilles' heel of *sharia*-based Muslim women's rights advocacy. As a proponent of *sharia*-based Muslim women's rights work, I take Kecia Ali's critique seriously. To respond, I will describe what I think would be a better model for Islamic marriage law, but also note some potentially serious obstacles to its success. In order to explain why I think my suggested alternative would be an improvement over the current law, I will first review the existing rules of Islamic marriage law, including those aspects that are downplayed by *sharia*-minded women's rights activists.

### **Islamic Marriage Law Today: Jurisprudential Theory and Presumptions**

Most Muslims today either are not aware, or do not like to emphasize, the theoretical presumptions embedded in the Islamic jurisprudence of marriage law because they are quite far from contemporary sensibilities. Established Islamic marriage contract law uses the contract of sale as its basic conceptual framework—a model which leads to some uncomfortable conclusions about what is being sold and the role of women's agency in that sale. Even more out of step with modernity is a historical context in which slavery and concubinage were socially acceptable. Because of their presumption that a man may legally have sex with his female slave, classical Muslim jurists draw an analogy between a marriage contract and a contract for sale of a concubine, using this analogy to work out the doctrinal details of the respective rights (sexual and otherwise) of a husband and wife. This analogy is supported by juristic interpretation of some Quranic verses to mean that there are two (and only two) situations in which sexual activity is Islamically licit: in marriage and with a female slave. Theorizing about what could be the commonality between these two situations, these jurists come to the conclusion that some sort of male ownership (the Arabic term is "*milk*," meaning control or dominion) is instrumental in legitimizing sexual activity. As Kecia Ali explains in her detailed study of the subject, "a comparison [i]s drawn between the dominion imposed by a husband through which his wife is caused to surrender her sexual self and the sovereignty established by the master [over his slave]" (Ali 2010: 15). Established Islamic jurisprudence therefore often describes marriage as a type of sale, with the item being purchased being a wife's sexual organs. There are qualitative differences between the rights of a wife and a female slave, of course, and the jurists do carefully lay these out, but nevertheless, the concept of male ownership of women's sexual parts becomes an important part of the traditional juristic understanding of what makes sex licit in Islam.

I would like to note that I, personally, am not convinced that sex with one's female slave is approved by the Quran in the first place. My own reading of the



relevant Quranic texts has always led me to a different conclusion than that held by the majority of classical Muslim jurists. (My alternative reading is untested, so I will not elaborate on it here except to say that I think it is plausible to read the critical Quranic phrase “what your right hands possess” as referring not to slaves but to some form of preliminary marital arrangement, such as we might today say someone has “pledged their hand in marriage.”) But setting aside my personal skepticism about whether the Quran allows sex with female slaves, I believe it is important to understand the role that this concept played in the development of Islamic jurisprudence on marriage contract law. Once we appreciate the jurists’ train of thought, it is then possible to ask productive questions about how much of the established doctrine of Islamic marriage law is still necessary today and how to most effectively construct meaningful alternatives.

The slavery analogy is distasteful today, but it is not *illogical*. If one begins with the contract of sale as the base model for marriage contract law, then we can ask, what sort of sales contracts are most analogous to marriage contracts? It does not take much thought to conclude that contracts involving human beings as the subject of sale make a much better analogy than contracts for the sale of bushels of wheat or horses. After all, a horse cannot complain to authorities that he is being mistreated and a bushel of wheat cannot assert that it no longer wants to be owned. But under Islamic law, a slave can do both things. Add to this a presumption that the purchase of a female slave includes the right to have sex with her, and it is quite understandable why the idea of ownership became important to jurists trying to work out the respective rights in a marriage contract.

The slavery analogy and the sales contract model directly impact several areas of traditional Islamic marriage law that have a particularly negative impact on women. I will take up three of these here: *mahr*, marital support, and divorce.

### *Mahr*

If we begin with the presumption that both marriage and slavery make sexual relations with a woman lawful, then it is natural to ask what these two situations have in common. One of the most obvious is that both involve some sort of payment—for a slave, it is the purchase price, and for a wife, the *mahr*. Thus it came about that juristic discussions of *mahr* “depend on and further the conceptual relationship between marriage and sale” (Ali 2010: 49). *Mahr* comes to be thought of as the “price” of access to a woman’s sexual parts, which are then “owned” by the husband.

Moreover, this “ownership” is specifically gendered—only males may own this sort of property. This provides an explanation for the juristic belief that women who owned male slaves do not likewise gain sexual access to them by virtue of the purchase price of the male slave. As the classical jurist Shafi’i put it, “The man is the one who marries and the one who takes a concubine and the woman is the one who is married, who is taken as a concubine. It is not permissible to make analogies between things that are different” (Ali 2010: 178). In other words,

although women are fully capable property owners in Islamic law generally, the type of ownership that makes sexual relations licit is considered to be different—it is available only to men. Moreover, this type of ownership is something that a man held with exclusivity. With its allowance of polygamy but not polyandry, Islamic law allows men to have more than one legal sex partner, but only allows women to legally have sex with one man (in a given time period). There is some logic to this as well, considering the ambiguous paternity issues involved when a woman has multiple sex partners. In communities where wealth, status and power were so strongly affected by paternalistic lines, it is not surprising to see legitimate sexual relations tied not only to male control, but to *exclusive* male control.

### *Marital Support (Nafaqa)*

Classical Muslim jurists draw a parallel between a husband's obligation to pay *mahr* at the start of a marriage, and his obligation to pay for basic support ("*nafaqa*") during the course of a marriage, and both are connected to the licitness of sexual activity. As the jurists conceive things, the *mahr* makes a woman *initially* sexually available to a husband, and the *nafaqa* enables *continued* sexual access to her during the marriage. Support and sexual access thus become inextricably linked in Islamic marriage law: if a husband provides his wife with adequate food, shelter and clothing, she has no right to deny him sexual access whenever he so desires. If he fails to provide such maintenance, she is not obligated to make herself sexually available to him. In short, "for Muslim jurists sex is a husband's right and support is a wife's right" (Ali 2010: 94–121).

This leads to many related doctrines commanding wifely obedience that can be quite disturbing to modern sensibilities. Not only does this doctrine of sexual availability mean that a wife's mobility is severely dependent upon her husband's consent, but it also has serious implications for marital rape. Because a husband's right to have sex with his wife is conditioned solely on his payment of support, her consent is irrelevant. The idea of marital rape is thus conceptually virtually impossible in this legal paradigm. Indeed, despite significant Islamic literature stressing the importance of attending to a woman's physical desires and sexual pleasure (including orgasm), the idea of marital rape is nevertheless an oxymoron in classical Islamic jurisprudence. It just does not fit in a system where the legality of sexual activity is based not on consent of the parties but upon male dominion and payment of financial support.

Even short of rape, there is not much room for sexual mutuality in a system of marital rights built upon a male-ownership view of sexual licitness. Traditional Muslim jurists discuss a woman's right to sexual activity within marriage, but her rights to sexual access to her husband (and even to non-sexual companionship) are virtually unenforceable. Indeed, these jurists think of sex as "the husband's right and not his duty," so it makes little sense to compel him to do it. Thus, a Muslim wife's right to sexual pleasure, though morally acknowledged in the scripture and literature, is legally meaningless. Because established Islamic jurisprudence



fundamentally views marriage as an exchange of lawful sexual access for dower and continued sexual availability for support, it does not require any mutuality in sexual rights. This is why Kecia Ali argues that without rethinking the entire premise of this system, Muslim women activists focusing on such mutuality will always be left with an unenforceable ideal, rather than tangible legal rights to sexual equality (Ali 2003).

The topic of marital support exemplifies the problem with selectively emphasizing only women-empowering parts of established Islamic law. As mentioned earlier, it has become popular for Muslim women's rights activists to point out that classical Islamic law does not require a wife to do housework. This is true, but tells only part of the story. A husband's marital support obligation is not considered compensation for a wife's performance of household chores, but it *is* considered compensation for her making herself sexually available to her husband. That very important caveat is not conducive to the picture of marital respect and mutuality that modern Muslim women activists want to portray. But without fully acknowledging it, the advocacy approach appears under-theorized and incomplete, and ultimately vulnerable.

### *Divorce*

Keeping in mind that established Islamic marriage law is based on a paradigm of male ownership of sexual access, it is not difficult to understand why the established legal doctrine gives a husband, but not a wife, the right to unilaterally end a marriage. The jurisprudence conditions the legality of sexual activity upon a husband's (or slaveowner's) exclusive ownership of the sexual bond, which means he must have unilateral control over the termination or continuation of that bond. Kecia Ali summarizes the doctrinal landscape this way:

The strict gender differentiation of marital rights, the importance of women's sexual exclusivity, and above all the strict imposition of rules about unilateral divorce, however contested in practice, all facilitate and flow from the key idea that marriage and licit sex require male control or dominion (Ali 2010: 181).

Indeed, the very meaning of the word "*talaq*," ("release") evokes parallels with the dominion involved in slavery. A *talaq* divorce "frees" or "releases" a wife, much as a slave is "free" or "released" in manumission, and jurists regularly use this analogy in their descriptions of unilateral divorce. Thus, the *mahr* enslaves a married woman's sexual self just as a slave comes to be owned through a purchase price, and *talaq* frees her from that bond just as manumission frees a slave.

Such a scheme does allow for limited wife-initiated divorce. *Khul'* divorce fits within the male-owned paradigm of marriage because it cannot happen without the husband's consent. To be sure, *khul'* is more empowering to women than divorce law in other systems where women could not initiate divorce at all, and it does honor the concept of marriage as a bilateral contract to which she is a party. But

jurisprudentially speaking, *khul'* is still conceptualized in the language of sales in a way that does not portray marriage itself as a mutual relationship. According to the classical jurists, in *talaq*, the husband relinquishes his control over his ownership of the wife's sexual organ, and in *khul'*, the wife buys back ownership over herself by compensating her husband (usually by returning her *mahr*) in return for a divorce. Put even more starkly, *talaq* is analogous to manumission of a slave and *khul'* is analogous to "*kitaba*," the Islamic legal doctrine by which a slave contracts to pay for his or her emancipation. Both require the husband's/master's consent, and both require the payment of some sum from the wife/slave for release.

### Modernity and Legal Reform

Virtually all of the presumptions that formed the jurisprudential backdrop for Islamic marriage law are no longer held today. There is now a near universal consensus against slavery among the world's Muslims, as is evident from the absence of substantial Muslim resistance to laws abolishing it throughout the world. Indeed, the very fact that Muslims today seem uncomfortable with the analogy between marriage and slavery itself illustrates how much norms have changed since the formative period of Islamic jurisprudence, when the analogy seemed to be a natural, almost self-evident one. It is unthinkable among most contemporary Muslims that a husband would have a female slave with whom he could have unlimited sex. In fact, both educated and lay Muslims routinely ignore the classical jurisprudence allowing concubines, often stating categorically that Islam allows sexual relations only in one situation: marriage.

Not quite as pervasive as the aversion to slavery, but nevertheless a significant shift from earlier norms are the changes in Muslim attitudes about mutuality in marriage and the role of women in society. Although equality is a contested concept, Muslims around the world nevertheless speak of marriage in terms of reciprocal and complementary rights and duties, mutual consent, and with respect for women's agency. Polygamy is tolerated in some Muslim circles, but the idea of male ownership of a wife's sexual parts in marriage would strike most contemporary Muslims as inappropriate and probably offensive to a healthy sexual relationship.

Many point to Muslim scripture and classical literature to support these ideals of mutuality—and there is significant material to work with. But formalizing these attitudes in enforceable rules is much more difficult. So, while Muslims generally disapprove of the idea of a husband forcing his wife to have sex, it is nevertheless difficult to find widespread Muslim consensus that marital rape should be a crime. This is because a wife's sexual availability is embedded in mainstream Muslim understandings of the rights and obligations of marriage. In fact, many who contest the general concept of wifely obedience will nevertheless tolerate it in the context of sexual access. Similarly, while Muslims routinely

speak of marriage as a contract based on the mutual consent of both spouses, most Muslims do not contest the idea that Islamic law gives husbands exclusive right to unilateral divorce. Thus, while many areas of state-enacted family law in Muslim countries have changed in response to public pressure for women's rights (such as raising the minimum age of marriage), there is strong social resistance to the abolition of things like polygamy or unilateral *talaq* divorce. Kecia Ali argues that this is because these aspects of Islamic marriage law are inextricably intertwined with the jurisprudential background that relies on the analogy of marriage and slavery—and that is something no one wants to talk about (Ali 2006: 43, 51). In other words, because the paradigm of the male ownership tie is so fundamental to the theoretical foundation of all Islamic marriage law, any women's rights work (legislative, social activist, or otherwise) that does not take this into account will always be limited in how much it can ultimately accomplish.

The obvious question, then, is this: is it possible to create a different scheme of Islamic marriage law, one that is better suited to modern sensibilities and not based on presumptions about slavery and male ownership of female sexuality? This question involves two issues. First is the question of Islamic law reform generally: is it possible to challenge existing Islamic legal doctrine at all, or is this religiously set in stone? Second, if such change is theoretically possible, what could a new Islamic law of marriage look like? I will take up the first question here and the second question in the following section.

### *Sharia Basics and the Challenges of Reform*

Is Islamic legal reform possible? Can established Islamic religious law be challenged without offending the divine? The answer may surprise those unfamiliar with the foundations of Islamic jurisprudence, and the fact that Islamic law is based on an epistemology that is self-conscious of its own human fallibility. In brief, the key principle is exemplified in the difference between “*sharia*” and “*fiqh*.” “*Sharia*,” usually translated as “Islamic law,” represents the idea of ultimate justice, the idea of God's divine directions about the ideal way to live—thus, “God's Law.” Muslim jurists use *ijtihad* (legal interpretation) to elaborate the doctrinal details when they are not obvious from the scriptural sources (the Quran and Prophetic narratives). What is significant about *ijtihad* is that it is a self-consciously fallible process. The jurists performing *ijtihad* to create legal rules recognized that in doing so, they were human beings struggling to articulate divine will, and therefore their conclusions could be, at best, only probable articulations of God's Law. No one could claim with certainty that his or her answers were “the right answer,” at least in this lifetime. That is why they use the term “*fiqh*”—which means “understanding”—for the doctrinal rules of Islamic law.

Moreover, there are a variety of *fiqh* rules on the same topics. Because the legal scholars could claim only probable correctness for their conclusions, they all recognized that they had to respect the differing conclusions of their colleagues as possibly correct. In other words, as long as it is the result of sincere *ijtihad*,

any *fiqh* conclusion qualifies as a possible—and thus legitimate—articulation of *sharia*. This is why *sharia*, as a body of tangible law, is inherently and unavoidably pluralistic. Eventually, the variety of *fiqh* opinions coalesced into several definable schools of law, each with equal legitimacy and authority for Muslims seeking to live by *sharia*. In short, for a Muslim, there is one Law of God (*sharia*), but there are many versions of *fiqh* articulating that ultimate Law here on earth (Quraishi 2008).

In contemporary discourses, especially in a legal advocacy setting, it is very important to keep the two terms *fiqh* and *sharia* distinct. Sloppy use of the term *sharia* can (and does) generate unnecessary resistance to what otherwise would be legitimate and uncontroversial assertions. It is unnecessarily provocative to advocate, for example, changing or reforming *sharia*, because this implies that God's Law is not itself already perfect, a suggestion likely to generate resistance from many Muslims. But advocating a change or reform of *fiqh* is quite a different matter, because *fiqh* is fallible, and in fact its many manifestations already reflect the consideration of a variety of different social norms. In short, *sharia* (God's Law) cannot be questioned by Muslims, but our *understandings* of *sharia*—namely, the *fiqh* rules—are always open to question.

This brings us directly to the question of reform. Are all the *fiqh* rules set in stone or can they be changed? At the most basic theoretical level, the answer seems simple—and encouraging: all existing *fiqh* rules are the product of *ijtihad*, and because *ijtihad* is fallible, they can be challenged by any alternative *ijtihad*. But things get a bit more complex when we look at the details. To fully understand what is fixed and what is negotiable in the existing *fiqh* corpus requires detailed knowledge of the *ijtihad* that produced each *fiqh* rule. More specifically, it is important to know the methodological pieces of the *ijtihad* analysis that created it: what was textually ambiguous and what was not, what was the reasoning behind using some prophetic narrations but not others, and what other jurisprudential tools were used and why.

There are many ways in which new *fiqh* rules can be made. One of the easiest is where the jurisprudential tools used in the past relied on a social context that has changed today in relevant ways. In these cases, simply applying classically-established *ijtihad* methodologies in the new changed circumstances will produce a new *fiqh* rule. But it is important to realize that this way of arriving at a new rule is not legal reform in the sense of *changing* established Islamic legal theory. Rather, it is an example of how a new rule can naturally result when the same tools are employed in a new context. For example, the tool of *maslaha* (public good) happens to be one that is extremely responsive to changing circumstances. If one is faced with a problematic *fiqh* rule that directly relies on a historical evaluation of the public good, that rule can be easily changed if the relevant public good has changed. There are other jurisprudential analytical tools with a similar built-in potential to generate new *fiqh* rules without posing any major upheaval to Islamic legal theory. For example, *qiyas* (analogical reasoning) requires *fiqh* scholars to identify the cause (*'illa*) of an original textual rule before expanding it to new cases. In the body of classical *fiqh* doctrine, there can be a diversity of opinion

on those causes and thus what analogies are appropriate and why. That diversity could continue today, with contemporary *fiqh* scholars identifying and applying a different cause—and thus reaching a new *fiqh* rule—for an established scriptural text.

Turning now to the issue at hand, Islamic marriage law, Kecia Ali has done a careful job of laying out how the analogy to slavery and concubines played a pivotal role in the development of traditional Islamic jurisprudence on marriage and marriage contract law (Ali 2006, 2010). That analogy was not scripturally-directed. It was created by fallible jurists who saw similarities between these two situations that led them to use this analogy in working out the doctrinal details of marriage law. These perceived similarities were largely based on social and philosophical realities of their time that no longer hold true today. Slavery and concubinage have fallen out of practice, and indeed, out of the moral compass of most Muslims. Moreover, new pervasive attitudes about mutuality in marriage make the idea of a husband's ownership of his wife's sexual parts surprising and offensive to many Muslims today. Thus, it would not be too radical a reform to re-think the slavery analogy. Jettisoning the analogy between marriage and concubinage does not challenge the use of analogy as an Islamic jurisprudential tool altogether, but rather just suggests that this particular analogy was based on social circumstances that are no longer appropriate today. This suggests that new *ijtihad* (Islamic jurisprudential reasoning) on Islamic marriage law that does not presume an analogy to slavery is possible, and could create different doctrinal rules than those summarized above. Moreover, if done thoroughly and well, it would carry just as much validity as the existing traditional doctrinal scheme. That is because Islamic law requires tolerance and respect for all *ijtihad* conclusions, no matter how diverse.

But there are two important caveats to the viability of any new theory of Islamic marriage law. Jurisprudentially-speaking, the success of a new legal scheme is dependent upon: 1) the expertise of those performing the new *ijtihad* and 2) the impact of past consensus. The first criterion is fairly obvious: without proper training in *ijtihad*, a scholar's *fiqh* conclusion will not garner the status of probability that gives it validity, and *ijtihad* expertise is no small accomplishment. Many prerequisites of language, legal reasoning, and knowledge of context must be mastered before a scholar can even begin to extrapolate legal doctrine from the *sharia* source texts. The complex, layered, soul-searching process of Islamic jurisprudential analysis is not for amateurs, no matter how well-intentioned or socially conscious they might be. But once one *is* an expert, whatever one produces deserves to be respected as a legitimate articulation of *sharia*, no matter how innovative the conclusions. Thus, the success of any new Islamic marriage law will depend very largely on the *ijtihad* qualifications of the legal scholar(s) creating it. Without appropriate training in established Islamic legal theory, their conclusions are likely to lack credibility in the general Muslim public, as well as the juristic community whose doctrine it is challenging.

The second caveat—the impact of past consensus—is a bit more complicated and potentially more of an obstacle. Consensus, a core idea in established Islamic legal theory, can have a drastic impact upon the staying power of individual *fiqh* rules. To put it briefly, Islamic jurisprudence is built upon the multiplicity of many different schools of *fiqh* doctrine, but if there is unanimous agreement of all qualified jurists of a given age, that agreement has a higher status than an average *fiqh* rule. According to Islamic legal theory, consensus transforms a *fiqh* rule from mere probability to certainty—the same epistemological status as the Quranic text. In the world of Islamic jurisprudence consensus can thus change a fallible human opinion into certain truth, binding upon all. This means that creating new Islamic legal doctrine is not so simple a matter as just engaging in new *ijtihad*, because Islamic legal theory did not allow new *ijtihad* on questions that had already been answered by scholarly consensus. For brand new questions never before presented (such as those presented by modern bio-ethics and technology), this is not a problem, for no classical jurist could have imagined the possibility of, say, *in vitro* fertilization or the use of the internet for conducting business. But it is a harder one for age-old issues such as a woman's access to divorce, or sexual availability of wives, where changes in social understandings make classical rulings inappropriate or even oppressive, but the legal questions have nevertheless been asked and answered by past jurists. In short, the doctrine of consensus means that, if consensus was reached in the past, the field is not open to new interpretations of the same questions by new *ijtihad* taking into account the realities of our time, perspectives, and circumstances.

One way out of the grip of this dead hand of the past would be to radically reform Islamic legal theory altogether to argue for changing or even deleting the classical doctrine of consensus to allow new opinions even in the face of settled past conclusions. This would be an extreme move, one that would risk losing supporters that might otherwise support reform done within the existing jurisprudential rules. To reject consensus would be to reject a foundation of Islamic legal theory—that jurisprudential scaffolding upon which all Muslim jurists stand to craft their legal rules. Purging one part of the methodological structure might render all of it vulnerable to change or deletion, and might thereby create intolerable foundational challenges. In the aftermath, how would contemporary Muslim scholars decide which of the existing tools would stay and which would go? Would new ones be added, and how? Would it even still be Islamic law if it were grown from such a different set of roots? These are obviously very big questions to which there are no ready answers. That is why many reformers choose paths of reform that do not involve such destabilizing questions, such as working within the existing structure of classical Islamic legal theory—using them to update and even correct mistakes in the positive law, while still maintaining those established foundations.

Frankly, I have not done enough research on the role of consensus in established Islamic marriage law to know if it played a significant role in solidifying the doctrinal rules discussed here. I do not know, for example, if it was asserted that there is consensus that male ownership is the basis of sexual licitness, let alone on



the doctrines emerging from that concept (unilateral divorce, sexual availability of wife, etc.). But, given the pervasiveness of these concepts and the similarity of doctrinal rules across the schools, it is certainly possible that this is the case. If so, then there is a powerful dead-hand-of-the-past consensus challenge with which contemporary Muslim marriage law reformers must deal.

But if it is possible to get past the obstacle of consensus in established Islamic marriage law—and I personally hope that it is—I can imagine one possible approach that modern Muslim jurists could pursue to create an alternative scheme of Islamic marriage law, one that is not based upon an analogy to slavery and concubinage. The alternative, as I see it, lies in the Islamic law of partnership contracts.

### A New Model for Islamic Marriage Law: The Partnership Contract

Could Islamic marriage contract law proceed from a different basis than the sales contract and the analogy to owning a female slave? I believe the answer is yes. There is an established body of Islamic contract law that seems to me quite well-suited for the subject of marriage and which would fit much better with contemporary sensibilities about marital respect and harmony, women's agency and the aversion to slavery. That body of law is the field of Islamic partnership contracts, a field that not only has historical pedigree going back to the earliest periods of Islamic legal practice, but also has commanded vibrant new attention, because it is instrumental in contemporary thinking about modern Islamic finance (El-Gamal 2006).

While I do not claim to be an expert in the Islamic contract law, let alone the nuances of partnership contracts, my review of this field indicates that it may be a fruitful area for new *ijtihad* on marriage contract law. To summarize, Islamic law regarding partnership contracts is based on several primary features that are useful for modern marriage contracts. Partnership contracts recognized under Islamic law depend on all the parties' continuous concurrent consent, in both the continuation of partnership and the terms imposed on each party. In addition, each party has to contribute something to the partnership—whether it is capital, labor, or something else. Beyond these generalities, there are many specific types of partnership contracts recognized in Islamic law, and the rules governing them vary across the schools. As an example of one doctrinal scheme, the Hanbali school (probably the simplest system) requires that partners agree 1) to assume relations of mutual agency and at times suretyship, 2) to contribute work, credit, or capital, or combinations of all three, and 3) to share profits in predetermined percentage shares. In addition, each partner binds the other partners in dealings with third parties and is liable for any infractions. Perhaps most significant for our present purposes, partnership contracts are revocable at will by any partner and terminate with the death of any partner (El-Gamal 2006).

There are three basic principles that are deemed to be essential to all partnerships, and cannot be varied even by the parties' agreement. These are 1) they are revocable at will, 2) losses are borne by partners in proportion to their shares of ownership of capital, and 3) profits must be shared by percentage, not in fixed sums. These three principles, too complicated to fully describe here, stem from Islamic legal doctrine prohibiting interest and speculative transactions (the underlying purpose being to prevent unfair advantage by capitalizing on future uncertainties) (Vogel 1998).

Given these basic parameters, I believe that Islamic partnership contracts are better suited to be the base theoretical model for modern Muslim marriage contracts than the current sales contract model. If we take seriously the principle—recognized by even classical jurists—that both husband and wife are parties to the contract, then partnership contracts are a logical framework for thinking about marriage contracts. Moreover, marriages vary widely between couples and contexts, and there are many different types of partnership contracts recognized in established Islamic law. This facilitates a variety of choices by spouses wishing to tailor their marriage contract to individual circumstances. For example, a limited partnership (*'inan*) is one where each of the partners contributes both capital and work, whereas in a silent partnership (*mudaraba*), some of the partners contribute only capital and the others only work; in a labor partnership (*abdan*), the partners contribute only work, and in a credit partnership (*wujuh*), the partners pool their credit to borrow capital and transact business with it. (Each of these simple models could be combined to form more complex types of partnerships.) Given the infinite diversity of marriage styles, using partnership contracts as the basis for Islamic marriage law is a very useful platform for couples to tailor their marriage contract to reflect their own unique financial, work, and life circumstances.

Another benefit of a new scheme of marriage law based on partnership contract law is that it would preserve the existing structure of marriage as a contract, and merely shift the contract type from that of sales to partnership. Thus, although it would not follow the existing jurisprudence based on sales and slavery contracts, a new partnership-based model of Islamic marriage law would not stray too far from established Islamic jurisprudence as whole, because it would draw from existing, well-established principles of a different area of Islamic contract law.

In sum, I believe that the Islamic law of partnership contracts is eminently well-suited to be the basis of new *ijtihad* for Muslim marriage law, because it would facilitate new rules honoring mutual spousal respect, including in sexual relationships, and the concept of women's agency. As I am not a specialist in Islamic contract law, I cannot fully work out the details here, but I can offer some preliminary suggestions on how this model could offer positive changes in some areas of existing Islamic marriage law that are harmful to women.

*Licitness of Sexual Activity*

As theorized in established Islamic jurisprudence, sex is made licit in marriage by a husband's payment (initially the *mahr*, and over time, marital support) by which he acquires exclusive "ownership" over the wife's sexual parts. As summarized above, this concept is directly related to the juristic analogy of marital sex to sex with a female slave: in both cases, payment makes sex lawful by analogy to a "sale" of sexual access. But what if the analogy to a sale contract is not used? What if the payment part of the marriage contract—the *mahr*—was not the *price* of sexual licitness, but rather, incidental to it?

In other words, what would make sex licit if marriage contracts are viewed through a partnership, not a sales, lens? The most obvious answer seems to lie in the core element of any contract—the mutual agreement of the parties. Even in established Islamic marriage law, the idea of consent of the parties is a crucial factor in establishing the validity of offer and acceptance of a marriage contract, and the payment of *mahr* and maintenance are only additional (required) components of that contract. Perhaps, then, mutual agreement could be considered the core element to the validity of a marriage contract, and thus the basis of the licitness of sexual activity within that marriage. This seems to me to be the most logical answer, and the most responsive to the idea of marriage as beginning with the mutual consent of autonomous human agents.

Basing the licitness of sex on mutual marital agreement also honors modern sensibilities about the nature of healthy sexual relationships. The classical scheme, by basing the licitness of sex on male control and ownership, easily leads to situations of women becoming sexual objects—mere receptacles for the male sex drive. Despite Islamic moral exhortations otherwise, existing Islamic law does not protect sex as a mutual act where agency and consent of both parties is essential. Today, the idea of treating women as sex objects is socially unacceptable. It is understood as harmful to women, to relationships, and to society in general. A partnership model of marriage contracts would facilitate a clear break from the destructive outdated idea of sexual licitness based on male ownership and exclusive control, looking instead to mutuality and consent.

This new concept of sexual licitness would also eliminate legal tolerance for marital rape. In a partnership model of marriage contract, marital support would no longer be a payment in exchange for the sexual availability of the wife, but rather, a bargained-for negotiation reflecting an agreement of mutual financial and labor responsibilities within a marriage. Because a husband's payment of support would no longer be the basis of the licitness of sex within the marriage, a financially-supported wife would no longer be obligated to be sexually available on demand. Sexual rights would be based on mutuality, respect and companionship, rather than male ownership and payment.

*Mahr*

This brings us specifically to the topic of the *mahr*. If, under a partnership model, *mahr* is not payment for access to a woman's sexual parts, then what purpose would it serve? Would it even still be important in a scheme of partnership-based marriage contracts? I believe that the *mahr* should remain an important element of Islamic marriage contracts, even under the partnership model, but not for the same reasons as imagined in the sales model. The *mahr* is specifically designated in the Quran and Prophetic narrations as important, so I think it should be taken seriously. The scriptural sources are silent, however, on the reasons behind the *mahr*, so we are left to speculate on this question. The idea that the *mahr* is payment for licit sexual access in established jurisprudence is one speculation by classical jurists based on their own social context and analogies that seemed appropriate at the time. But we are not obligated to agree with their speculation.

Once we eliminate the idea of the *mahr* as consideration for sexual access, then some interesting new insights open up. One thing that is striking in the Quranic verses on *mahr* is the suggestion that it is a type of gift rather than a bargained-for consideration. In contract law, consideration always involves a mutual exchange of something. But gifts are given freely, not exchanged for something else. On the other hand, because it is commanded by the Quran, a *mahr* is not purely a gift either. Instead, it seems more like an effect or incident of the contract, automatically and externally imposed upon the parties by law—in this case, the Law of God. I imagine it to be similar to the fair labor statutes and rules of consumer protection in American law in that these are legislated to automatically attach clauses to some routine contracts in order to protect parties likely to be vulnerable.

While special protection to women as the vulnerable parties in a marriage contract might seem sexist to some, I do not find it offensive that the Quran would take into account the biological and social realities that can put women at a financial disadvantage. That is, there are natural limitations on many women's working hours due to childbearing, infant nursing and child rearing, for those who choose to do so. Add to these facts the historical realities of gender discrimination in the marketplace, many of which are still true today, and the gendered power imbalances that cause women specific financial disadvantages are hard to ignore. (To take just one contemporary example, an American Muslim woman might find good use for her *mahr* in simply funding post-partum time off from her job, given the lack of federally required paid maternity leave in the United States.) In sum, I find it quite logical to imagine that the Quranic verses require *mahr* in order to provide a type of "fair labor" tool by which women could neutralize the potential biological and social disadvantages they might face during their life.

Then again, not every woman becomes a mother, and not every woman needs help in attaining financial independence. Accordingly, the *mahr* requirement allows for individualized tailoring to respond to each woman's unique circumstances. The substantive content of each *mahr* is highly negotiable—it can be anything of value, ranging from a substantial financial sum to a symbolic token. (The

Prophetic traditions mention several creative, non-monetary *mahrs*, including one man's conversion to Islam, and another's teaching his wife a chapter of the Quran.) Those women who do not feel they will need this tool can tailor their marriage contract accordingly. But for those who do, it is a powerful tool that, because of its Quranic source, cannot be easily dismissed by those around her.

In sum, whereas the classical jurists spent very little time thinking about the practical realities that the *mahr* serves in a woman's life, a new *ijtihad* of marriage law could benefit from the insights provided by women's activists (Muslim and non-Muslim) chronicling the financial disadvantages that women regularly face. Seen in this light, the *mahr* is, like consumer protection law, a legally mandated incident of every marriage contract that reflects a higher legal principle that must be respected by the contracting parties. This understanding of *mahr* could eliminate the feeling of "selling oneself" with which many brides associate it.

### *Marital Support*

The *mahr* is not the only aspect of the marriage contract that could be tailored to a couple's individualized needs under a partnership model. Because marital support would no longer be the basis for a male-ownership concept of sexual licitness, there would also be no automatic presumption that the husband must be the breadwinner. Spousal maintenance would instead be a mutually bargained-for provision of each marriage contract. I see several social advantages to this increased flexibility in spousal financial obligations. First, it fits the reality that every marriage is different, and each spouse may have different skills that don't always translate well to the husband-as-breadwinner default model. What if, for example, the husband is an artist who gets paid in large lump sums every few years, but the wife has the skills to bring home a regular monthly paycheck? Or the husband prefers to be the primary child-rearer and the wife's job pays more anyway? The partnership model allows spouses to negotiate these roles rather than operate against default presumptions that do not fit their lives.

Given the many types of partnerships recognized in Islamic law, there are a variety of legally ready-made choices for spouses deciding how to allocate services and property contributions to their marital household. For example, one couple might create an '*inan* (limited) partnership marriage contract where both spouses agree to contribute both capital and labor ("labor" being defined as either an income-creating job or household work and childrearing, or both). I would imagine this scenario would work well for a marriage in which both spouses plan to earn an income, but in unequal or unpredictable amounts. The traditional stay-at-home-parent scenario, on the other hand, seems more suited to a *mudaraba* (silent) partnership where one partner contributes labor and the other contributes capital. In each case, Islamic partnership law would provide further details on how the profits and losses should be borne by each party. (In the case of the '*inan*, the spouses need not contribute equal amounts of capital and they may determine the profit shares as they like, but losses should be borne in proportion to the capital

contributions. In a *mudaraba*, Islamic partnership law provides that the spouse who provides the capital is liable for all losses, and the non-capital-providing spouse bears no losses (except in losing his/her labor), and is not entitled to any capital profit until the capital-providing spouse has recouped his or her investment, and then only in the agreed percentage. An even more flexible marriage contract might use the model of an *abdan* partnership, in which both parties contribute only work, and Islamic partnership law holds that such partners are free to agree upon their relative shares of ownership of the partnership capital, and are obliged to share losses accordingly. And, again, all these simple models could be combined to create more complex combinations of marriage arrangements.

Finally, marriages mutually arranged under the partnership model would more powerfully include many contract stipulations that currently have only limited enforceability under existing Islamic marriage law. There is nothing inconsistent with the partnership model, for example, if a husband and wife were to agree that their marriage will be monogamous and create enforceable consequences for breach of this provision.

### *Divorce*

Perhaps the most significant change that would occur in Islamic marriage law by switching to a partnership model would be the equalization of access to divorce. Because Islamic partnership law is based on the fundamental principle of all parties' continuous concurrent consent to the continuation of the partnership, this means that in Islamic marriage law based on partnership contracts, both spouses would have the right to end the marriage at will. Thus, *both* husband and wife would have a unilateral right of divorce (except in the Maliki school, which would require mutual consent). This very powerful doctrinal change would honor modern sensibilities about women's agency and correct the uneven, often manipulative power that traditional Islamic marriage law allows husbands to wield against their wives in a time of divorce. It would also complete the disentanglement of the idea of male ownership as central to the legitimacy of marital relations that exists in established marriage law.

Because it would be so drastic a change from centuries of established Islamic marriage law, mutual spousal rights to unilateral divorce might prove to be a rather hard sell in Muslim publics. Indeed, exclusive male access to unilateral divorce has been one area that has been extremely resistant to legislative change in modern Muslim-majority countries, largely because so many believe it is a fundamental aspect of Islamic marriage law. But the idea of women exercising *talaq* divorce is not itself unheard-of in established jurisprudence. Even under existing Islamic marriage law, a woman can acquire a "delegated" *talaq* right from her husband, usually documented in her marriage contract (Ali 2009). This "delegated divorce" option has in fact garnered a lot of attention from contemporary Muslim women's activists encouraging Muslim women to preserve this right for themselves in modern Muslim marriage contracts. What the partnership model of marriage



contracts would do, then, would be to eliminate the gendered preference of the unilateral divorce right. Instead of automatically giving it to husbands (and allowing it to wives only through delegation from their husbands) the partnership model would give both spouses this right equally (or under the Maliki school, both would be limited by a requirement of mutual consent). This is possible because (contra the sales model) male ownership of the marriage tie would not be the central legitimizing feature of a partnership-based Muslim marriage contract.

Moreover, equalization of access to divorce means that under the partnership model of marriage contracts, there would no longer be any need for a doctrine of woman-initiated divorce (*khul'*) and the sharp doctrinal differences between it and male-initiated unilateral (*talaq*) divorce. Whether or not a woman keeps her *mahr* would thus have nothing to do with whether or not she initiated the divorce. With the *mahr* being disentangled from the idea of payment for sexual access (and the return of *mahr* in a *khul'* divorce being described as a wife "buying herself back"), a woman's *mahr* would be controlled only by the mutually-agreed terms of the marriage contract. Similarly, judicial divorce (*faskh*), if it existed, need not focus on fault or grounds for divorce committed by the husband, but rather, could become more like third-party mediation of asset division and other logistical needs of divorcing parties, whenever a couple is in need of such assistance.

## Conclusion

In this chapter, I have briefly sketched out how a new scheme of Islamic marriage law based on Islamic partnership law might work. If such a doctrine were fully developed and implemented, it would enable women-empowering rationales to flow logically with the doctrinal rules, rather than at cross-purposes to each other, as occurs now. The result would likely be a vast improvement in the situation of many Muslim women as well as the strategies employed by *sharia*-based women's rights activists. However, I am also aware that not everyone would welcome such a new scheme. First, it may not be considered legitimate according to the jurisprudential boundaries of acceptable Islamic law reform, and thus would not be respected by religious authorities with the strongest influence on the general Muslim public. Second, many Muslims (jurists and laypersons) see no need for reform in the first place, and are quite satisfied with established *fiqh* doctrine on marriage as it is. Thus, it is inevitable that, no matter how solid the reasoning, a new partnership model of Islamic marriage law will only ever appeal to a *part* of a given Muslim audience.

From this fact, I take two lessons: 1) *fiqh* diversity means that the new has to tolerate the old, and 2) it is always good to have a back-up plan. The first lesson is simply this: the same *ijtihad* principle that would give legitimacy to a new partnership-based doctrine also gives legitimacy to the existing sales-based doctrine. The fallible nature of both old and new doctrinal schemes means that both must be allowed to exist. This preservation of doctrinal diversity is, in my

opinion, one of the most powerful attributes of Islamic jurisprudence, because it facilitates choice. That means that there is no way to excommunicate or officially eliminate the established scheme of Islamic marriage contract law, even if a new scheme is crafted. That new scheme would simply exist alongside the existing scheme in the marketplace of *fiqh*, and modern Muslims would have the freedom to choose between them.

Given that first lesson, the second becomes even more important. Despite my enthusiasm for the prospect of a new partnership-based Islamic marriage law and what it could do for Muslim women, I have to ask: what is the back-up plan if this new model (if and when it is created) fails to take sufficient hold? Do we use the imperfect strategies developed under the established Islamic marriage law, or do we hold out until we can convince more Muslims to adopt the new and improved model? The dilemma feels similar to that faced by American proponents of the Equal Rights Amendment (ERA) to the United States Constitution in the early 1980s when it failed to be ratified by the last deadline. Given that the ERA provided clearly-stated coherent constitutional protection for women's rights, should these activists have held out until it could be proposed again, or was it better to use the not-as-ideal Equal Protection doctrine of the Fourteenth Amendment to work for gender equality? The activist in me leans toward doing the best we can with what we have, although the theorist in me much prefers the cleaner, more coherent path of new *ijtihad* and fresh legal reform. A back-up plan provides us something to use in the interim before an alternative scheme of Islamic marriage law can be created (and even afterwards, for those Muslim women choosing to follow the traditional scheme). This means that the strategies currently employed by *sharia*-based Muslim women's rights activists may be the only tools available to provide some modicum of mutuality and equality in Muslim marital rights right now. These strategies may not be, as Kecia Ali points out, as theoretically clean as a fully-formed alternative model of marriage in Islam, but they have the advantage of being immediately effective in those limited areas where they can help women.

This brings us back to the *mahr*, and my advice to modern Muslim brides (and grooms). Yes, the jurisprudence that equates *mahr* with the "price" of female sexual access is disturbing, and thus it is understandable that many Muslim women opt out of including a substantial *mahr* in their marriage contracts. However, I believe that this knee-jerk rejection of *mahr* is shortsighted. Why let inappropriate and outdated juristic presumptions about sexuality rob women of what could be a very powerful tool for financial independence? I believe that strategic use of the *mahr* should be part of a back-up plan for women's empowerment under existing doctrine, and it will have an even more powerful role in women's agency if it is part of a partnership scheme of marriage law that is developed in the future.

So, to Kecia Ali's challenge for a new model, I answer "yes, there is a better way," and I have laid out here my ideas of what that way could look like. The legal theorist in me, the ERA supporter in me, would love a brand new doctrinal scheme along this model to become the Islamic norm. But the activist in me warns that if this doesn't happen, we must not abandon the needs of the many women living

within the classical model. That is why I believe the current approach of *sharia*-based Muslim women's rights activists, no matter how much Kecia Ali points out its ideological mismatch with established law, should nevertheless be respected and understood for the pragmatic good that it does, working within the existing paradigm. But I also believe that Kecia Ali and I share a hope for a future where such back-up plans are no longer necessary.<sup>1</sup>

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<sup>1</sup> I wrote this chapter during the last days before giving birth to my third child, a feat possible only with the enduring support of my cherished husband, Matthew. I would like to note my deep gratitude to him and to all three children for their patience.

